United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 18, 2005

TO : Helen E. Marsh, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Durez Corporation
Case 3-CA-25193

530-6001-5025
530-6050-1612-3700
530-6067-4001-1700
530-6067-4033-2500
530-8054-1500

This case was submitted for advice concerning whether the Employer violated Section 8(a)(5) by refusing to grant scheduled wage increases and benefits after announcing to employees that those terms and conditions would be implemented.

We conclude that the Employer's refusal to grant the scheduled wage increases and benefits violated Section 8(a)(5).

FACTS

The Employer manufactures and markets industrial resins. The Union (Pace Local 1-209) represents all full-time hourly employees at the Employer's facility. The parties' most recent collective-bargaining agreement was effective from November 1, 1998 through October 31, 2003. On September 23, 2003, the parties began successor contract negotiations. On November 11, the extended contract expiration date, the Employer locked out the employees. On December 26, the Employer submitted its revised last and final offer.[1] On December 30, the employees rejected the offer. The Employer then declared impasse and announced

[1] The offer included proposals for wage increases for the proceeding five years (year one, 1%; year two, 1%; year three, 1.5%; year four, 2%; year five, 2.5%); pension plan increases for years one, three, and five of the contract; replacement of holidays for the first year of the contract and deletion of a holiday for the second year of the contract; vacation pay for the first year of the contract and a reduction in vacation pay for the second year of the contract; disability benefits for the first three years of the contract; meal allowances for the first three years of he contract; and a medical plan phase-in rate for the first three and one half years of the contract.

that it was ending the lockout. The employees agreed to return to work, and the Employer scheduled their return for January 11, 2004.[2]

On January 9, the Employer held morning and afternoon meetings with employees to discuss the employees' terms and conditions of employment upon their return to work. The Employer presented an overhead slide projection of their terms and conditions of employment, which corresponded to proposals and tentative agreements contained in its last and final offer. The slides included descriptions of the Employer's proposed wage rates for the next five years and other proposed benefits, such as holidays, pension plan increases, vacation pay, disability, meal allowances for every year of the Employer's proposed five-year agreement, and medical plan phase-in rates. Employer representatives read verbatim from the slides, and passed out hardcopy versions of the overhead slide information.

A Union steward testified that after viewing the slide presentation, he and other employees believed that employees were going to receive the "out year" (future) wage and benefit increases. The Employer acknowledges that it did not tell employees that the "out year" wage and benefit increases shown on the slides would not be paid in the absence of a contractual agreement, and further acknowledges that it told employees that it was discussing terms and conditions that would be implemented consistent with the last and final offer. In fact, with the exception of a proposed pension benefit increase,[3] the Employer implemented all the first-year wages and benefits contained in its last and final offer.

By letter of January 15, the Employer informed the Union that it was prepared to renew bargaining, and that it wanted to resolve some issues implicated by the lack of a contract.[4] On January 19, the parties met for a bargaining session. The Region has determined that the subject of "out year increases" was not discussed at the meeting.[5]

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[2] Herein all dates are 2004 unless otherwise indicated.

[3] The Region intends to issue complaint on the Employer's failure to implement the pension increase. That issue is not being submitted for advice.

[4] These included questions regarding whether employees accrued additional vacation time during the work stoppage.

[5] Four Union witnesses, supported by their notes, testified that the Employer never discussed the topic. Two Employer witnesses, supported by their notes, testified that the

During the meeting, the Employer discussed a variety of terms in its last and final offer that were affected by the contract expiration, such as union security, dues check off, and arbitrability of hiatus grievances. On about March 18, the Employer submitted a wage proposal that offered higher wages for years two through five than those contained in its last and final offer in exchange for Union bargaining concessions. On April 8, the Union membership rejected the Employer's offer. In June, the parties met once for negotiations.

On October 29, the Employer's human resource manager informed the Union president that it was not going to implement the wage and benefit increases for the second through fifth years of the last and final offer. A few days later, the plant manager reiterated the Employer's position to the Union representative. The Union representative responded that the Employer needed to honor the terms described in the January 9 meeting or schedule bargaining over the issue.[6]

Soon after October 29, the Employer confirmed by memorandum that it was not implementing the "out year" wage and benefit increases of its last and final offer.[7] The Employer has followed the plan that it described in its October 29 memorandum.

ACTION

We conclude that the Employer violated Section 8(a)(5) by refusing to grant scheduled wage increases and benefits after announcing to employees that those terms and conditions would be implemented.

Employer told the Union that there would be no "out year" increases in wages and benefits because no contract was in place. The Employer also alleges, and the Union denies, that on a few occasions between January 19 and May 2004, the Employer told the Union president that it was not going to implement the "out year" wage and benefit increases of its proposal.

[6] According to the Union representative, the plant manager did not claim that it had previously informed the Union on January 19 about its refusal to grant the "out year" increases.

[7] The memorandum provided, inter alia, that there would be "no change" in wage increases, and that increases in the employees' share of medical insurance costs would be implemented.

An employer may not make unilateral changes in its union-represented employees' existing terms and conditions of employment.[8] Existing terms and conditions of employment include customary wage increases and benefits, as well as announcements of future wage increases or benefits that create a reasonable expectation of taking place on the part of employees.[9] Where parties are in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes in existing terms and conditions extends beyond the mere duty to provide the union with notice and an opportunity to bargain; it encompasses the duty to refrain from implementing such changes at all, absent overall impasse on bargaining for an agreement as a whole.[10]

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[8] See Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 198, 206-207 (1991) (the Act, independent of a contract, requires preservation of existing terms and conditions); NLRB v. Katz, 369 U.S. 736, 747 (1962).

[9] Liberty Telephone & Communications, 204 NLRB 317, 317-318 (1973), enfd. 324 F.3d 735, 739 (D.C. Cir. 2003) (employer's action in announcing wage increase, though subject to IRS approval, created a reasonable expectation of an increase to take place upon a contingency); More Truck Lines, 336 NLRB 772, 772 (2001) (once promised, future nondiscretionary wage increases are existing terms and conditions of employment); Armstrong Cork Co. v. NLRB, 211 F.2d 843, 847 (5th Cir. 1954) (petitioner unlawfully cancelled its prior announced wage increase without consulting the union, since conditions of employment include not only what the employer has already granted but also what it promised to grant). See also Johnstown America, Case 6-CA-33127, Advice Memorandum dated May 28, 2003 (employer violated Section 8(a)(5) when, after unilaterally implementing its last contract proposal, it refused to pay promised annual wage increases that were included in its proposal).

[10] Visiting Nurses Services of Western Massachusetts, 325 NLRB 1125, 1130-1131 (1998), citing Bottom Line Enterprises, 302 NLRB 373 (1991), enfd. mem. sub nom. Master Window Cleaning, Inc. v. NLRB, 15 F.3d 1087 (9th Cir. 1994) (negotiations for a successor collective-bargaining agreement); RBE Electronics of S.D., 320 NLRB 80, 81 (1995) (negotiations for an initial collective-bargaining agreement).

In the instant case, the Employer held employee meetings on January 9 in which it announced that it was implementing its final contract offer, including a five-year schedule of "out year" wage increases and other benefits. The Employer explained the new wages and benefits to employees, displayed them on a slide projector, read verbatim from the slides, and distributed hard copies of the slide presentations to the employees. The Employer acknowledges that it never told employees at the meeting that the wage and benefit increases described were contingent on a contractual agreement. As one Union steward testified, after viewing the Employer's presentation, he and the other employees believed that employees were going to receive the "out year" wage and benefit increases that the Employer described at the meeting. In sum, we agree with the Region that the Employer promised those terms and conditions to the employees on January 9, and that they became a "reasonable expectancy of the employment relationship."[11] Accordingly, the Employer's refusal to implement them violated Section 8(a)(5).

The Employer asserts that it told the Union at a January 19 negotiating meeting that implementation of its wage and benefit proposals was dependent on reaching a contract, and that the employees knew well before October that they would not be receiving "out year" wage increases. However, the Union has denied that the Employer made such a statement at the January 19 meeting, and the Region has credited the Union. In any event, the promised wage increases became existing terms and conditions of employment on January 9 when the Employer announced them to the employees. At that point, the Employer's unilateral decision was unlawful, regardless of whether that decision was conveyed to the Union within two weeks after the initial promise was made or ten months later in October.[12]

Further, the Employer was not free to unilaterally change the new existing wages and benefits, even if the Union failed to specifically request bargaining in response to the Employer's proposed changes, because the parties were in negotiations for a collective-bargaining agreement

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[11] Liberty Telephone & Communications, 204 NLRB at 318.

[12] See Promedica Health Systems, Inc., 343 NLRB No. 131 (December 2004), citing Liberty Telephone & Communications (employer violated Section 8(a)(5) by announcing wage increase, then telling employees two weeks later that its implementation was in doubt).

at that time and those subjects were part of negotiations for the overall agreement.[13]

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to grant scheduled wage increases and benefits after announcing to employees that those terms and conditions would be implemented.

B.J.K.

[13] See Bottom Line Enterprises, 302 NLRB at 373-374 (employer violated Section 8(a)(5) by unilaterally implementing one of the subjects that was part of negotiations for an overall agreement notwithstanding union's failure to request bargaining). If the Stone Container Corp., 313 NLRB 336 (1993), line of cases were applicable, the Union's failure to demand bargaining (assuming the Employer told the Union on January 19 that it would not honor the January 9 promises) arguably would be a recognized defense to the Section 8(a)(5) allegation. Thus, in Stone Container Corp. and similar cases, the Board held that the Bottom Line rule - requiring impasse on overall negotiations before permitting implementation of a particular proposal – does not apply to a proposal regarding a discrete subject, such as previously recurring annual wage reviews, that just happen to coincide with overall contract negotiations. However, the Stone Container analysis is not applicable to the instant case because the wage increases at issue here were not previously established recurring events that just happened to coincide with overall contract negotiations. See also American Printing House for the Blind, Case 9-CA-36736, Advice memorandum dated August 3, 1999, fn. 8 (comparing Bottom Line Enterprises with Stone Container).